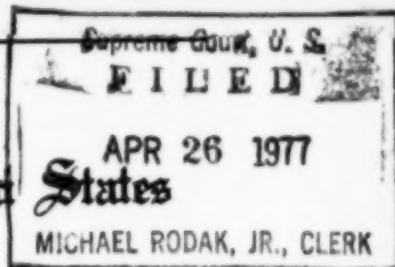


In The
Supreme Court of the United States
October Term, 1976



No. 76-1192

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.,
Petitioners,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.
Respondents.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT*

BRIEF OF RESPONDENTS

**WESTINGHOUSE ELECTRIC CORPORATION AND
GENERAL MOTORS CORPORATION IN OPPOSITION**

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**BRIEF OF RESPONDENTS
WESTINGHOUSE ELECTRIC CORPORATION AND
GENERAL MOTORS CORPORATION IN OPPOSITION**

OPINIONS BELOW

The opinions below are properly listed in and appended to the petition.

JURISDICTION

The petitioners'¹ statement of jurisdiction is correct. The

1. The petitioners are the Secretary of Defense, the Director of the Defense Supply Agency, the Director of the Office of Federal Contract Compliance Programs and the Secretary of Labor.

petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit was filed on February 28, 1977 and received by counsel for the respondents² on March 4, 1977. On March 23, 1977 the Clerk extended the time for filing a brief in opposition to and including April 27, 1977.

QUESTIONS PRESENTED

1. Whether the government may disclose private confidential information submitted to a government agency by a government contractor which information is exempt from mandatory disclosure under exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4), and the disclosure of which would violate 18 U.S.C. §1905.

2. Whether a government contractor submitting private confidential information which is assertedly exempt from mandatory disclosure under exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4), and whose disclosure would assertedly violate 18 U.S.C. §1905 is entitled to a trial *de novo* in a suit to prevent disclosure of that private information by the government.

STATUTES AND REGULATIONS INVOLVED

The petitioners' statement of the statutes and regulations involved is accepted by the respondents with the addition of two pertinent regulations for the Department of Labor, 29 C.F.R. §70.21 (Appendix F, *infra* at 1a) concerning disclosure of private information, and 29 C.F.R. §70.71 (Appendix G, *infra* at 2a), concerning the promulgation of supplementary regulations by the Office of Federal Contract Compliance Programs.

2. The respondents joining in this brief in opposition are Westinghouse Electric Corporation and General Motors Corporation. The brief of the respondent United States Steel Corporation in opposition will be filed separately. The term "respondents" when used herein refers to Westinghouse Electric Corporation and General Motors Corporation.

STATEMENT

The petitioners' statement of the case is essentially accurate. However, subsequent to the filing of the petition the party requesting disclosure of the information at issue in the *General Motors* case below moved, as *amicus curiae*, for leave to file in this Court and submitted a brief raising a "jurisdictional" issue. The respondents will reply to the motion and supporting brief of *amicus* in a separate document.

ARGUMENT

The respondents concur in the petitioners' observation that these cases raise important issues concerning the purpose of the Freedom of Information Act ("FOIA") and the rights of private parties under the Act.³ Despite this importance, however, the reasons urged for granting the petition should be insufficient to convince the Court to exercise its discretionary jurisdiction to review the decision below. Contrary to the petitioners' assertions, the holding of the court of appeals below presents no substantial conflict with *Charles River Park "A" v. Department of Housing & Urban Development*, 519 F.2d 935 (D.C. Cir. 1975) or *Pennzoil Co. v. Federal Power Commission*, 534 F.2d 627 (5th Cir. 1976) on the issues presented by exemption 4 of the FOIA, 5 U.S.C. §552(b)(4) and 18 U.S.C. §1905. Furthermore, the court of appeals did not err, as the petitioners contend, in recognizing the respondents' right to assert their claims under

3. The importance of the issues raised in the petition is demonstrated by the recent action of the Ninth Circuit. That court has very similar issues currently pending before it, but has deferred further consideration of the matter pending this Court's decision on the petition in *Westinghouse. Hughes Aircraft Co. v. Schlesinger*, No. 75-1064 (9th Cir.) (Order Withdrawing Submission, filed April 4, 1977) (Appendix H, *infra* at 3a). Furthermore, a petition for certiorari to the United States Court of Appeals for the District of Columbia Circuit which raises several issues closely related to those presented in *Westinghouse* is currently pending before the Court. *Prudential Insurance Co. v. National Organization for Women*, No. 76-1052 (petition for certiorari filed February 1, 1977).

the exemptions to the FOIA and 18 U.S.C. §1905 at a trial *de novo*.

1. The court of appeals offered three independently sufficient theories to support its affirmance of the order of the district court enjoining disclosure by the petitioners of the private confidential information submitted to them by the respondents. First, because 18 U.S.C. §1905 is one of the statutes included in exemption 3 of the FOIA, 5 U.S.C. §552(b)(3), it bars the disclosure of the information in question.⁴

4. 18 U.S.C. §1905 prohibits, *inter alia*, any employee of any department or agency of the United States from disclosing

"in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any . . . return, report or record made to or filed with, such department or agency . . . which information concerns or relates to the trade secrets . . . or to the identify, confidential statistical data, amount or source of any . . . expenditures of any . . . corporation . . ."

The court of appeals reasoned that because §1905 is one of the statutes included in exemption 3 of the FOIA, 5 U.S.C. §552(b)(3), information of a character described in §1905 was exempt from mandatory disclosure. Therefore, the FOIA could not be relied upon by the petitioners to provide the authorization of law required to permit disclosure under §1905. 542 F.2d at 1201-03.

The court also recognized that the Department of Labor's regulation, 29 C.F.R. §70.21(a), (Appendix F, *infra*, at 1a), by which the petitioners are bound, which restates the provisions of §1905 and has the effect of law, meets the qualifications of exemption 3. 542 F.2d at 1201-1203.

Shortly before the court of appeals decision was published, however, Congress amended exemption 3 of the FOIA. 5 U.S.C. §552(b)(3), *amended*, Pub. L. 94-409, 94th Cong. (September 13, 1976). This amendment may well affect future resolutions of the issue of the nexus between §1905 and exemption 3. See H.R. Rep. No. 94-580 (pt. 1), 94th Cong. 2d Sess. at 22-24 (1976).

542 F.2d at 1199-1203. In addition, the court found that exemption 4, 5 U.S.C. §552(b)(4), which relates to confidential commercial or financial information, exempts the documents from compelled disclosure under the FOIA and that §1905 therefore prohibits its disclosure. 542 F.2d at 1207-09. Finally, the court held that exemption 4, considered in conjunction with its legislative purpose, supports the implied right of a supplier of private information to invoke the equity jurisdiction of the courts to enjoin disclosure of information within the exemption. 542 F.2d at 1210-12. The court found that the exemption 4 protection from disclosure was provided not only as a matter of fairness to the supplier, but as a matter of right. 542 F.2d at 1211.

Rather than conflicting with the decision below, the first case cited by the petitioners, *Charles River Park "A", Inc. v. Department of Housing & Urban Development*, 519 F.2d 935 (D.C. Cir. 1975), supports the second theory adopted by the Fourth Circuit. That theory states that exemption 4 in conjunction with §1905 provides the respondents with the protection sanctioned below. The petitioners rely on the supplementary disclosure regulations adopted by the Office of Federal Contract Compliance Programs,⁵ 41 C.F.R. Part 60-40 (Pet. App. E), to provide the authorization needed to avoid the prohibitions of §1905. (Pet. at 12, 15). *Charles River Park* holds, however, that the FOIA is neutral with regard to information within exemption 4 and does not authorize the release of such information. 519 F.2d at 942. Contrary to the contention of the respondents, under *Charles River Park* the release of exempt information can not be justified by regulations based on the

5. The supplementary regulations, 41 C.F.R. Part 60-40, were adopted pursuant to 29 C.F.R. §70.71 (Appendix G, *infra* at 2a). Section 70.71 requires that supplementary regulations be "not inconsistent with" other Department of Labor regulations governing disclosure of documents. 29 C.F.R. §70.71.

FOIA.⁶ Therefore, even if *Charles River Park* does not agree with the Fourth Circuit's holding that exemption 4, when considered with its legislative purpose, protects the information from disclosure in these cases, it buttresses an alternative holding which is sufficient to support the judgment below.

Pennzoil Co. v. Federal Power Commission, the other case the petitioners cite to establish a conflict among the circuit courts, is readily distinguishable from the decision below. First, *Pennzoil* is not a "reverse-FOIA" case comparable to *Westinghouse*, *Charles River Park* or *Sears, Roebuck & Co. v. General Services Administration* ("*Sears II*").⁷ No third party ever requested the information at issue in *Pennzoil*. No 28 U.S.C. §1331 suit was ever filed in the district court seeking declaratory or injunctive relief pursuant to the implied right of action of the FOIA exemptions and §1905. *Pennzoil* was simply an Administrative Procedure Act⁸ ("APA") review of an FPC order requiring the submission of valuable data which would be open to public inspection. Unlike these cases, the agency in *Pennzoil* was promulgating an order in furtherance of its duty to regulate the industry it is charged with supervising and was acting in a matter in which it has considerable expertise.

The most important distinction between *Pennzoil* and the decision below, however, is that the issues presented by §1905 were not considered by the *Pennzoil* court. Therefore, as with *Charles River Park*, even if the *Pennzoil* construction of exemption 4 arguably conflicts with that of the Fourth Circuit, the private right of action accorded by the prohibitions of §1905

6. The court further stated that the regulations which sanctioned disclosure and thereby limited the scope of §1905 were not supported by the "housekeeping" provisions of 5 U.S.C. §301. 519 F.2d at 942-43.

7. ____ F.2d ____, 14 F.E.P. Cases 945 (1977).

8. 5 U.S.C. §701, *et seq.* (1970).

in conjunction with the FOIA exemptions suffice to support the decision below.

2. The second question presented by the petitioners is whether judicial review of an agency's decision to disclose is limited to a determination that the disclosure is not an abuse of discretion. Properly, no conflict among the circuits is alleged because the courts of appeals considering the issue have found *de novo* review appropriate. In *Sears II* the District of Columbia Circuit upheld the right to a trial *de novo* because the reverse-FOIA suit is an original proceeding based on the private right of action implied by the exemptions to the FOIA. 14 F.E.P. Cases at 946. Because reverse-FOIA suits are brought under 28 U.S.C. §1331 as declaratory judgment actions, rather than to review agency action under the Administrative Procedure Act, the district courts may pursue *de novo* consideration of the issues. Citing *Charles River Park*, the court in *Sears II* stated that the *de novo* review standard which applies in a suit to compel disclosure is also appropriate in a suit to compel nondisclosure.⁹

The petitioners cite *Camp v. Pitts*, 411 U.S. 138 (1973), in support of their contention that the inquiry in these cases should be limited to a review of the administrative record to determine whether the agency has abused its discretion. A critical distinction should be drawn, however, between the situation in *Camp* and in reverse-FOIA cases. The judgment of an agency is entitled to the deference accorded by the abuse of discretion standard when, as in *Camp*, that judgment is exercised in the area of the agency's expertise. However, the decision to disclose the information requested in these cases is not within the expertise of the petitioners.¹⁰ The deference to which the

9. *Id.* at 5, *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190, 1213 (4th Cir. 1976).

10. In *Pennzoil* the Fifth Circuit applied the abuse of discretion standard prescribed by the APA. 534 F.2d at 631-32. As explained above, however, that case was presented to the court pursuant to the APA to review an order of the Commission in the area in which it has substantial expertise.

petitioners would be entitled by a court reviewing a decision made in the course of their administration of pertinent Executive Orders applicable to federal contractors should not extend to the review of a disclosure determination which must be based, at least in part, upon considerations of the competitive effects of releasing confidential information.¹¹ None of the petitioners have made any claim of expertise in such matters.

Even under *Charles River Park*, the lone court of appeals decision applying the abuse of discretion standard in a reverse-FOIA case,¹² the procedure would be essentially the same as that followed by the courts below. *Charles River Park* requires that the district court first conduct an evidentiary hearing to determine whether the information sought is exempt from disclosure. The *Charles River Park* court stated that this hearing is not a review of agency action, but rather is necessary to determine if the reverse FOIA plaintiff has a claim at all. 519 F.2d at 940-41, n.4.

The Fourth Circuit thoroughly considered the scope-of-review issue and reached the proper result in allowing the respondents to present their evidence at a trial *de novo*. According to the petitioners, the agency decision to disclose

11. In determining whether commercial or financial information is confidential within the meaning of exemption 4 of the FOIA, one relevant inquiry is whether disclosure would cause substantial competitive harm to the supplier of the information. See *National Parks & Conservation Ass'n. v. Morton*, 498 F.2d 765, 767-69 (D.C. Cir. 1974) and *National Parks & Conservation Ass'n. v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976).

12. 519 F.2d at 939. The *Charles River Park* court applied the abuse of discretion standard because it relied upon the Administrative Procedure Act in finding jurisdiction. However, in light of *Califano v. Saunders*, 45 U.S.L.W. 4209 (Feb. 23, 1977) and *Planning Research Corp. v. FPC*, ___ F.2d ___, No. 75-1540 (D.C. Cir. March 10, 1977), this reliance upon the APA as a jurisdictional grant was apparently misplaced. The application of the abuse of discretion standard by the court may therefore be suspect. See *Pharmaceutical Mfrs. Ass'n. v. Weinberger*, 411 F. Supp. 576, 577 n. 1 (D.D.C. 1976).

pursuant to regulations should be essentially unreviewable (Pet. at 17). The court below, however, characterized the limitation upon judicial review of agency interpretations of the prohibitions of §1905 as "an incredible rule." 542 F.2d at 1215. To require the supplier of confidential information to rely on the government to protect his interests when the *ipse dixit* of the agency would be final would be grossly unfair. *Id.* The supplier should be entitled to protect his rights through a fair and adequate hearing on proper evidence no less broad than that accorded to a curious busybody by the FOIA. *Id.*

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

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APPENDIX F**Department of Labor, Rules and Regulations 29 C.F.R. §70.71****§70.21 Records not disclosable.**

(a) Pursuant to the provisions of 18 U.S.C. 1905, every officer and employee of the Department of Labor is prohibited from publishing, divulging, disclosing, or making known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with the Department or any agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. No officer or employee of the Department of Labor shall disclose records in violation of this provision of law.

(b) No records of the Department of Labor with respect to matters specifically required by statute to be kept secret shall be made available for inspection or copying under the provisions of this part. By virtue of the exclusionary language in 5 U.S.C. 552(b)(3) the disclosure requirements of the Freedom of Information Act do not apply to or authorize the disclosure of records with respect to any matters specifically exempted from disclosure by statute.

(c) No records of the Department of Labor with respect to matters specifically authorized under criteria established by Executive order to be kept secret in the interest of the national defense or foreign policy and properly classified pursuant to such order shall be made available for inspection or copying under the provisions of this part. Records concerning such matters are expressly excluded from the application of the disclosure requirements of the Freedom of Information Act by the provisions of 5 U.S.C. 552(b)(1).

APPENDIX G

Department of Labor, Rules and Regulations 29 C.F.R. §70.21

§70.71 Authority of agency officials in Department of Labor.

Each agency of the Department of Labor for which an officer or officers have authority to issue rules and regulations may through such officers promulgate supplementary regulations, not inconsistent with this part, governing the disclosure of particular or specific records which are in the custody of that departmental unit. Agencies of the Department which do not or have not promulgated special supplementary regulations governing disclosure of particular records shall disclose such records pursuant only to the provision of Subparts A and B of this Part 70.

APPENDIX H

Order Withdrawing Submission

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 75-1064

HUGHES AIRCRAFT COMPANY,
Plaintiff-Appellant,

-versus-

JAMES A. SCHLESINGER, SECRETARY, U.S.
DEPARTMENT OF DEFENSE, LT. GEN. WALLACE
ROBINSON, DIRECTOR DEFENSE SUPPLY AGENCY;
PHILIP J. DAVIS, DIRECTOR, OFFICE OF FEDERAL
CONTRACT COMPLIANCE; PETER J. BRENNAN,
SECRETARY DEPARTMENT OF LABOR,
Defendants-Appellees.

Before: BARNES, ELY and CHOY, Circuit Judges.

Submission for decision of this case is withdrawn pending the determination by the Supreme Court of the Government's petition for a writ of certiorari in *Brown v. Westinghouse*, Sup. Ct. No. 76-1192.

If the Court denied certiorari in *Brown*, this case will stand re-submitted as of the date of the denial of certiorari and if the Court grants certiorari in the *Brown* case, this case will not be re-submitted until the Court's decision in *Brown* is filed, on which date this case will stand re-submitted.

FILED
April 4, 1977

U.S. Court of Appeals
Ninth Circuit

Emil E. Melfi, Jr.
Clerk